Nos. 99-244 and 99-253

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In The

Supreme Court of the United States

No. 99-244

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

and

No. 99-253

MARATHON OIL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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INTEREST OF AMICUS CURIAE

For the second time in this contract dispute between the United States and two private oil companies, Marathon Oil Company and Mobil Oil Exploration & Producing Southeast, Inc. ("Petitioners" or "Lessees"), the American Petroleum Institute ("API") finds it vitally important to appear in order to voice its concerns. Initially, API joined as amicus curiae in the Petitioners' rehearing request before the Federal Circuit below, after the first panel decision revealed a fatal miscomprehension of the Outer Continental Shelf Lands Act ("OCSLA"), through which the nation's offshore mineral leasing program is administered. While the Federal Circuit panel did grant a rehearing, its second decision, from which the petitions for writs of certiorari are now being sought, contained only a superficial correction of the court's damage to ongoing Outer Continental Shelf ("OCS") lease activity. Believing that the law now established by the Federal Circuit decision, if left unmodified by this Court, will permanently harm this nation's OCS leasing program, API respectfully submits this amicus curiae brief in support of the Petitioners' writ applications.[1]

API is a petroleum industry trade organization representing approximately 400 companies engaged in oil and gas exploration and production in the United States. The vast majority of the oil and gas leases on the OCS are held by API member companies, and API members have bid tens of billions of dollars at OCS lease sales. In Amicus

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Curiae's view, the decision by the Federal Circuit so misconstrues basic contractual law governing OCS lease operations that the OCS legal landscape has fundamentally shifted. The import of that decision's flawed contractual analysis will alter the economic risk structure of the OCSLA crafted by Congress after decades of experience and study. API is gravely concerned that this reallocation of economic risk will not only harm the oil and gas exploration and producing industry, but might actually threaten the viability of the entire OCS leasing program.[2] Amicus Curiae respectfully urges the Court to grant review to correct this decision.

STATEMENT OF THE CASE

The case presents a breach of contract claim brought against the United States relating to mineral leases issued to the Petitioners/Lessees by the Minerals Management Service ("MMS") in an area of the Outer Continental Shelf offshore the State of North Carolina. While not questioning the finding of the Court of Federal Claims that the government, through Congressional interference, had materially breached its leases with the Lessees, the Federal Circuit decision voided the lower court's restitution award. The panel majority, with Judge Newman dissenting, found that objections to the Lessees' lease exploration plans raised by the State of North Carolina under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451, *et seq.*, essentially annulled all other concerns over the federal government's contractual conduct. In so deciding, the court inflicted critical damage to the law

[2] The Congress has declared that the OCS is a "*vital national resource reserve* . . . which should be made available for expeditious and orderly development. . . . " 43 U.S.C. § 1332(3) (emphasis added).

governing OCS mineral leases that will have far-ranging and harmful effects on *all* holders of OCS leases. If the Federal Circuit's decision is allowed to stand, any future Congressional action that unlawfully thwarts OCS exploration activity, if worked in tandem with state CZMA opposition, will authorize the federal government to confiscate the entirety of a lessee's investment in its lease – even if the federal government, as lessor, acknowledges that the lessee's exploration plans comply fully with all agency requirements. The damage to the OCS leasing program – the source of 26% of domestic natural gas production, and 20% of domestic oil production – could be severe.

The OCS mineral leases that are the subject of this dispute were issued by the MMS under the authority of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* OCSLA leases require lessees to pay up-front cash bonuses, followed by periodic lease rental payments, for the tracts they acquire. 43 U.S.C. § 1337. Under the OCSLA statutory scheme, an OCS lessee may thereafter prepare a Plan of Exploration ("POE") as part of the "exploration" stage of lease activity.[3] If recoverable

[3] As described in a leading treatise on federal oil and gas law, the POE will include:

> a description of the type and sequence of exploratory activities; a description of drilling vessels, platforms, and other structures to be used; the types of geophysical equipment that will be used; the location of each exploratory well planned; an oil spill contingency plan; an air-quality analysis; and other relevant geological and geophysical information. . . .
>
> If drilling affects a state with a federally-approved coastal zone management program, an Environmental Report (Exploration) must also be submitted. . . .

resources are found, the lessee may then submit to the MMS a Plan of Development and Production or "POD" to continue on to the "production" stage.[4] In the course of filing either plan, the OCSLA further stipulates that the OCS lessee will certify that its activities will be consistent with the coastal zone management plan of any affected state that has an approved CZMA program. *See* 43 U.S.C. § 1340(c)(2) (applying CZMA certification requirement to exploration plans); 43 U.S.C. § 1351(h) (applying the requirement to production plans).

For exploration plans, the OCSLA provides that the Secretary of the Interior, who acts through the MMS, "shall approve such plan . . . within thirty days of its submission, except that the Secretary shall disapprove [the] plan" upon determining that (i) a proposed activity would result in a condition under 43 U.S.C. § 1334(a)(2)(A)(i) (which sets forth conditions for lease cancellation based on probable harm to life, property, or the environment) and (ii) the proposed activity cannot be modified to avoid such conditions. If the MMS disapproves an exploration plan for those specified reasons, the OCSLA expressly provides that the Secretary may

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PATRICK H. MARTIN, *Outer Continental Shelf Leases and Operating Regulations, in* 2 LAW OF FEDERAL OIL AND GAS LEASES, 25-1, 25-36 (Rocky Mountain Mineral Law Foundation 1999). *See also* 30 C.F.R. § 250.203.

[4] The POD "includes information similar to that in the exploration plan: the specific work to be performed; a description of drilling vessels, platforms, and pipelines together with safety and pollution control features and labor, material, and energy requirements; well locations; current interpretations of all relevant geological and geophysical data; environmental safeguards and safety standards; and a time schedule of the activities to be undertaken." *See* MARTIN, *supra* at 25-39; 30 C.F.R. § 250.204.

cancel the lease and "the lessee shall be entitled to compensation. . . . " 43 U.S.C. § 1340(c)(1).

Finally, to aid this Court's appreciation of the background of this case, under 43 U.S.C. § 1351(h)(1)(B), the Secretary's initial approval of a POD includes a separate requirement, *not applicable at the exploration stage*, that the development and production plan either must have *already* received coastal zone consistency certification approval from any affected state, or the Secretary of Commerce must have already overridden the state's objection pursuant to 16 U.S.C. § 1456. If state CZMA approval or a Secretarial override cannot be shown in the first instance, 43 U.S.C. § 1351(h)(2)(A) carries the unique provision that the "lessee shall not be entitled to compensation [under the OCSLA] because of such disapproval [of the development and production plan]."

In the instant action, the Lessees prepared and filed a Plan of Exploration for their OCS leases pursuant to the OCSLA's lease exploration provisions, 43 U.S.C. § 1340. As expressly recognized by the Federal Circuit's decision, however, the MMS was prohibited from taking any action with regard to this POE by the Outer Banks Protection Act ("OBPA"), P.L. No. 101-380, § 6003, 104 Stat. 484, 555 (1990), which was enacted as a rider to the Oil Pollution Act of 1990, at the behest of the North Carolina delegation in Congress some nine years after issuance of the leases at issue.

REASONS FOR GRANTING THE WRITS

A. The Federal Circuit Decision Destroys the OCS Lease Bargain

1. The Decision Ignores the OCS Lease Terms by Focusing on "Permit Denials"

In describing the OCS Lessor/Lessee contractual relationship, the Federal Circuit panel decision

recognized that the "[l]ease terms grant lessees the 'exclusive right and privilege to drill for, develop, and produce oil and gas resources' in exchange for an up-front cash bonus and periodic lease payments." *See* Petitioner's Appendix ("App."), Docket No. 99-244 at 3a.[5] This statement captures the long-accepted understanding of the obligation undertaken by the lessee of an OCS lease. In return for payments of up-front cash bonuses, followed by periodic lease rental payments, the lessee obtains the exclusive right, *if* its assessment of the leased property suggests further activity is warranted, to begin planning for the exploration and possible future development of the lease. Indeed, it was *at this very part of the lease process* – the filing of the initial POE – that the federal government's critical breach in this case – the eleventh-hour enactment of the OBPA – occurred.

The Federal Circuit's examination of the OCS lease relationship, however, stops at this point. At first, the lower court came close to the critical question of whether the OBPA could interfere with an existing contractual relationship: "[t]o read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns." App. 10a. But the panel majority then conducts a precipitous retreat: "[i]n any event, because the outcome of the case does not turn on this issue, we need not further dwell upon it." *Id.* Thereafter, avoiding any real focus on the impact of the OBPA on the government's

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[5] *Marathon Oil Co. v. United States*, 177 F.3d 1331 (Fed. Cir. 1999). Subsequent citations to the decisions below will continue to refer to the Appendix to the Petitioner's writ application in Docket No. 99-244.

contractual conduct, the panel majority locks its attention on a collateral issue involving an event *subsequent* to the POE filing, the CZMA consistency objection.

The OBPA's enactment cannot be so lightly ignored. As correctly observed by the Court of Federal Claims, the OBPA *materially altered both the structure and framework of the Petitioners' leases, and the leasing process itself.* As such, the OBPA's new terms and conditions cannot be read into their leases. Moreover, as the court noted,

> common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptable drilling rights.

App. 63a.[6] This is a precise description of the nature of the government's breach in this case: the OBPA's "material alteration" of the structure and framework of the OCS lease bargain, and the attempted creation of "tenuous and unilaterally interruptable" drilling rights. Indeed, the crux of this dispute is the OBPA's effect of *wholesale contractual frustration.* It is *not*, as characterized by the Federal Circuit, a mere sideline dispute involving a "permit denial" or a CZMA "consistency complaint." Notwithstanding the Federal Circuit's re-characterization of this case as merely involving the filing of a single POE and a resultant "denial of permits," there *are no* actual "denials" of either a POE, or a permit application, in the record before this Court, because the OBPA prohibited MMS from acting on the Lessees' POE.

The Federal Circuit panel's spurious issue of "regulatory denials" is essentially the remainder of certain lines of reasoning that had underpinned the Federal Circuit

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[6] *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 324 (Fed. Cl. 1996).

panel's initial opinion, but were later removed. As noted earlier, the initial panel decision contained numerous errors in describing the interaction between the OCSLA and the CZMA and the proper construction of an OCS lessee's "performance." First, the initial panel decision had misread the OCSLA to require a lessee to receive CZMA state concurrence for its POE or face lease cancellation without compensation. The panel based its rejection of the restitution remedy on the Lessees' alleged resultant "violation" of the OCSLA.[7] But in arriving at this conclusion, the court erroneously relied on 43 U.S.C. § 1351, the provision of the CZMA that applies to development and production plans, *not* Plans of Exploration. On rehearing, the panel corrected this error, and removed all direct references to § 1351.

In addition, the panel majority asserts that "North Carolina's legally valid objection to the consistency certification *left unfulfilled the requirement that the lessees demonstrate compliance with [all] applicable statutes and regulations.*" App. 12a (emphasis added).[8] This statement

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[7] App. 36a. *Marathon Oil Co. v. United States*, 158 F.3d 1253 (Fed. Cir. 1998), superseded by *Marathon Oil Co. v. United States*, 177 F.3d 1331 (Fed. Cir. 1999). The panel wrote that "[u]nder these circumstances, a lessee's options are to 'submit an amendment to such plan, or a new plan, to the Secretary of the Interior,' " *citing* 16 U.S.C. § 1456(c)(3)(B). App. 37a. But as demonstrated by Petitioners' arguments, the OBPA would only have further frustrated their attempts to submit such an amended plan.

[8] The original panel decision had gone even further, and reasoned that "[u]nder the circumstances of this case, to treat the *denial of the POE* as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters." App. 34a (emphasis added). In other words, the panel had so misread the statute that it believed that the MMS was entitled to deny an exploration plan

finds no support in the CZMA, the OCSLA, or MMS regulations. The Lessee fully demonstrated "compliance with [all] applicable statutes and regulations," when adding the consistency certification, as called for by 43 U.S.C. § 1340(c)(2), to their POE filing. North Carolina's disagreement with the certification in no way establishes a failure by the Lessees to comply with the law.

The panel decision under review now rests on a more narrowly-conceived legal analysis, *i.e.*, that North Carolina's CZMA consistency objection, *per se*, annulled all other concerns over the federal government's contractual conduct. The CZMA objection, by itself, has thus been elevated far beyond its tangential role in this OCS lease dispute.[9] As shown below, the panel's final decision not only refuses to address the federal government's own OCS lease obligation, and thereby continues to misconstrue the law and the terms of the OCS lease, but also continues to ignore the federal government's own public-record position on the effects of the OBPA, and on the Lessees' lease performance.

2. The Decision Fails to Enforce Reciprocal OCS Lease Performance

The panel majority cites Section 10 of the MMS's OCS lease form, noting that it provides that lessees "shall

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on CZMA consistency grounds. Instead, 43 U.S.C. § 1340, the section of the OCSLA dealing with exploration activity, *separates* the CZMA consistency certification concurrence process from the MMS's decision to approve or disapprove the plan of exploration. Once again, the panel's decision on rehearing dropped its reference to a POE "denial."

[9] To repeat: (1) there was no "denial" of the Lessees' POE by the MMS; and (2) there could have been no lawful denial of the Lessees' POE on CZMA consistency grounds.

comply with all regulations and orders relating to exploration, development, and production." App. 10a. Clearly, the lease carries with it attendant regulatory requirements, but as discussed in more detail below, the record shows that the MMS strongly endorsed the Petitioners' own lease compliance and performance in entering into the exploration stage of the leasing process. Moreover, as noted by the Court of Federal Claims:

> The lease agreements do not specifically state the parties' obligations regarding exploration plans but provide that the lessees agree to 'comply with all regulations and orders relating to exploration.' Under the OCSLA and its regulations, exploration may only be conducted pursuant to approved exploration plans. Thus, in order to explore, plaintiffs are obligated to prepare and submit exploration plans. *The necessary reciprocal obligation is that the government will timely and fairly consider – not necessarily approve, but at least promptly consider – exploration plans properly submitted.*

App. 70a (emphasis added) (citing the MMS's express statutory duty under the OCSLA to approve or otherwise act on plans within thirty days of submission, 43 U.S.C. § 1340(c)(1)). Stated differently, "the contracts at issue provide that submission of plaintiffs' POEs is predicated on an *unequivocal governmental duty* to timely and fairly consider, though not necessarily approve, them." App. 72a (emphasis added). More tellingly, the court also recognized that:

> It is not necessary [to the finding of a contractual breach in this case] for plaintiffs to have actually submitted such exploration plans because it is clear [the United States] cannot and will not perform its end of the bargain as required by the OCSLA.

App. 73a. Thus, under the Court of Federal Claims' proper reading of the OCS Lease and the law of contracts,

the Lessees deserve restitution in this case even without consideration of their actual filing of a POE. *A fortiori*, the Lessees are entitled to restitution without consideration of an attendant POE filing event, *i.e.*, the lodging of North Carolina's CZMA objection.

3. The Decision's Misguided View of Lease Performance Cannot Support Confiscation of the Lease Bonuses

Avoiding analysis of the reciprocal obligations highlighted by the Court of Federal Claims, the Federal Circuit's decision attacks the Lessees' "performance." The panel majority repeatedly refers to the state's CZMA consistency objection to the POE, implying that such "environmental concerns" excuse or can even validate the government's contractual misconduct. For example, the panel majority writes that "North Carolina's legally valid objection to the consistency certification left unfulfilled the requirement that the lessees demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and licenses." App. 12a. Two paragraphs later, the court starkly suggests that any finding of federal misconduct in the role played by the OBPA in Petitioners' lease delays would be tantamount to "eviscerat[ing] . . . salutary protections of the nation's fragile coastal lands and waters." App. 13a.

These observations are without foundation.

The Federal Circuit's complaint of the Lessees' "nonperformance" completely ignores the fact that the MMS has repeatedly described the Lessees' "lease performance" on the record in superlative terms. For example, the MMS Deputy Director described the Environmental Report prepared for the Lessees' Manteo project as "the most comprehensive body of environmental information ever assembled on a proposed well in the history of the

U.S. offshore drilling program."[10] Moreover, at the time of its filing the MMS announced that the Lessees' POE was the *most comprehensive exploration plan ever submitted to the agency*.[11] Finally, Interior Secretary Lujan publicly acknowledged that the Lessees' POE, as submitted, was "approvable in all respects" under all MMS requirements, and that the agency's hands were tied by the provisions of the OBPA – *not* by agency concerns over the "salutary protections of the Nation's fragile coastal lands and waters."[12] In other words, the federal government, as lessor, itself never asserted that the Lessees' project raised serious "environmental concerns," and the panel majority inappropriately introduced this issue into the lease dispute.

Moreover, the panel majority states that the effect of the OBPA on Petitioners' leases is irrelevant, because "appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended

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[10] 21 Environment Reporter, *Current Developments*, (BNA) June 8, 1990, p. 314; *see also* A.949-50.

[11] September 29, 1990 MMS News Release. The MMS even submitted public comments strongly supporting the Lessees' request to the Secretary of Commerce to override North Carolina's CZMA objections. In these public comments, the MMS observed that:

> An unbiased consideration of the analyses and conclusions contained within the Final [Environmental Report] and the [Environmental Assessment] will result in a determination that no significant effects are expected in the area of the Manteo Prospect, or to the State's coastal zone resources, as a result of Mobil drilling a single exploration well nearly 39 *miles* from shore.

MMS Comments, June 4, 1991 at p. 9 (emphasis in original).

[12] App. 13a; A. 963.

throughout the period in which the OBPA was effective." App. 13a. This assertion is directly undercut by the federal government's own actions. The *MMS*, recognizing the dictates of the OBPA, issued *sua sponte* in 1990 a unilateral suspension of ongoing operations for the Petitioners' North Carolina leases based solely on the OBPA. Moreover, Interior Secretary Lujan stated publicly that the OBPA would support additional delays, and the preparation of additional studies, far into the development and production stage of Lessee's OCS leases: "[t]he objectives of any future . . . recommended studies will be reviewed at each phase of development."[13]

In addition, and as the legislative history of the OBPA cited by Petitioners clearly reveals, North Carolina's "consistency objection" was merely a single weapon in a formidable political arsenal to oppose *any and all* drilling off its coastline without regard to particular environmental impacts. Indeed, long before the State's CZMA consistency objection, which was based on allegedly "insufficient information", *was even issued*, the public record confirms that North Carolina Governor James G. Martin had already announced, in correspondence to President Bush, that North Carolina was opposed *per se* to any offshore drilling before the year 2000, *regardless of the completion of any "new studies,"* or, for that matter, any showing of the absence of adverse impacts of Lessees' exploratory drilling activity.[14]

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[13] *Report to Congress on the Findings of the North Carolina Environmental Sciences Review Panel* (April 6, 1992), Manuel Lujan, Secretary of the Interior, A. 414.

[14] Scott Pendleton, *Offshore Drilling Ban Draws Fire*, The Christian Science Monitor, July 6, 1990 at 8, available in LEXIS, News Library, Arcnews File (reporting Governor Martin's request to the President, and his corresponding entreaty for help from the State's congressional delegation); Thomas C.

In comments later to the MMS on the Lessees' POE, the Governor reiterated his complaint that North Carolina should have been included in those portions of the OCS for which a 10-year drilling moratorium had been granted, and again announced that *"only if the present policy changes [i.e., the ten-year drilling moratorium] or a critical domestic energy crisis develops will I re-evaluate my opposition to Mobil's drilling proposal."* (Emphasis added.) Accordingly, it is critically important to understand North Carolina's opposition to *all* offshore drilling, as well as its overriding concern with later stages of OCS development, in approaching the Lessees' "failure" to obtain the State's CZMA consistency concurrence for the drilling of a single exploratory well.

4. The Decision Alters the OCSLA's Economic Risk Structure

Even while acknowledging that the OBPA and subsequent events may have affected the Petitioners' rights to explore and develop their OCS tracts, the Federal Circuit nevertheless authorized the confiscation of Petitioners' up-front "bonuses," asserting that it could find

> no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks,

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Hays, *Oil Concerns Criticize Offshore-Curb Plan*, The New York Times, June 28, 1990 at D-7, available in LEXIS, News Library, Arcnews File. *See also* Matthew Davis, State News Service, June 28, 1990 available in LEXIS, News Library, Arcnews File (describing the "solid front" formed by Governor Martin and the North Carolina congressional delegation to oppose all offshore drilling).

> or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease.

App. 15a. Thus, the court saw no "principled distinction" between *force majeure* or other accidental events, and the Congress's imposition, at the request of the North Carolina delegation, of the political gauntlet of the OBPA.

In its ruling, the Federal Circuit's majority decision has overturned a long-standing and vital principle underlying the essential OCS lease bargain: the OCS lessee's "huge, up-front considerations" are payment for the essential right to explore for oil and gas which *may or may not* be found. In turn, the reward of successfully finding and profitably producing oil and gas is balanced against the overarching risk, borne by the OCS lessee, that the oil and gas will *not* be found, or cannot be produced in profitable quantities. That risk includes the OCS lessee's exposure to not only the loss of its up-front bonus payments, but often to the loss of additional substantial investments involving many millions of dollars – devoted to the initial lease exploration and development activity. The panel majority's expansion of the lessee's risk even further, by finding a facile analogy between a lessee's risk of dilatory *force majeure* events or other contingencies, and the OBPA's serial array of governmental obstacles that *completely stifled* Petitioners' lease activities, destroys the "bargain" between OCS lessees and the government. In fact, as duly noted by the Petitioners, the Federal Circuit's decision casts into doubt a basic contractual balance underlying not only the thousands of currently

outstanding OCS leases, but also an untold number of other highly valuable government contracts.

Judge Newman's dissent captures the essence of the panel's error. When encountering the same passage from the majority opinion quoted above, Judge Newman recognized that:

> [such an] analysis is not supportable by any legal or equitable theory. What Marathon paid for was the right of exploration. Marathon bore the risk that the exploration might fail to find oil or gas, but Marathon did not bear the risk that exploration would be entirely barred, especially by the same party from whom it bought the right.

App. 21a. In Judge Newman's view, this case posed this fundamental question: "whether the government shall deal fairly and legally with its contracting partners," App. 18a. As Judge Newman succinctly noted:

> While it was the objection of North Carolina that led to the prohibition of exploration of the Outer Banks, first by state refusal to certify the exploration, then by [Congress's] enactment of the Outer Banks Protection Act, and then by the refusal of the Secretary of Commerce to override the state's objection, *this does not justify the federal government's confiscation of Marathon's payment for a contract entered into before any such objection arose.*

Id. (emphasis added).

This Court should correct this drastic error in order to preserve the integrity of the OCS leasing program. If the panel's ruling is left in place, OCS lessees will be subject to a rule of law that allows the government to confiscate their entire lease consideration if, while beginning the initial CZMA consistency certification process, a newly-enacted federal statute arbitrarily upsets both

ongoing and future lease operations. If allowed to stand, this erroneous ruling would rearrange the entire economic structure of the OCSLA, thereby shifting enormous and unintended economic risks to lessees. And, as observed by the Petitioners, the Federal Circuit's decision creates an even larger uncertainty as to when the remedies of rescission and restitution are *ever* available against the federal government – effectively vitiating the fundamental presumption underlying government contracting that "[t]he United States does business on business terms." *United States v. National Exch. Bank*, 270 U.S. 527, 534 (1926).

B. The Integrity of the OCS Leasing Program is Vital to This Nation

The widespread effects of the Federal Circuit decision on other OCS lessees and on the future of the OCS leasing program should lead the Court to grant the Petitions. The OCS leasing program is vital to the nation.[15] By the end of 1998, over eleven billion barrels of oil and 130 trillion cubic feet of natural gas have been produced.[16] In 1997, the OCS accounted for fully 26% of domestic natural gas production, and 20% of domestic oil production.[17]

At the end of 1998, nearly 8400 oil and gas leases issued under the OCSLA existed on the nation's Outer

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[15] The Congress has declared that the OCS is a *"vital national resource reserve . . .* which should be made available for expeditious and orderly development. . . . " 43 U.S.C. § 1332(3) (emphasis added).

[16] *Statistical Highlights Fiscal Year 1997*, U.S. Department of the Interior, Minerals Management Service (1998); *MMS Offshore Stats, Third and Fourth Quarters 1998*, U.S. Department of the Interior, Minerals Management Service.

[17] *Id.*

Continental Shelf.[18] Additional leases have been issued by the MMS in 1999, and lease sales will continue into the foreseeable future. Over the last ten and one-half years, OCS lessees have paid the federal government over $6 billion in lease bonuses,[19] and the MMS collected over $1.4 billion in lease bonuses in 1997, and another $1.3 billion in 1998.[20] As of June of this year, over 85% of all oil royalties paid on Federal and Indian leased lands came from the OCS, and over 77% of gas royalties.[21]

In light of the Federal Circuit's ruling, all OCS lessees, as well as bidders at future OCS lease sales, will be faced with stark uncertainties regarding the OCSLA statutory scheme. The most disturbing aspect of the panel majority's decision is the denial of restitution or other compensation to a lessee in the face of unilateral federal and state decisions which thwart lease activity. This will mean that every OCS lessee beginning lease exploration will now risk losing its entire lease investment – even if it complies fully with every MMS requirement. As observed by the Court of Federal Claims, "common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased

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[18] *MMS Offshore Stats, Third and Fourth Quarters 1998, supra* n.16.

[19] U.S. Bureau of Census, *Statistical Abstract of the United States: 1997* (117th Edition); Washington, D.C. (1997); *Mineral Revenue Collections, January-December 1998*, U.S. Department of the Interior, Minerals Management Service; *Mineral Revenue Collections, January-June 1999*, U.S. Department of the Interior, Minerals Management Service.

[20] *Mineral Revenue Collections, January-December 1998, supra* n.19. Bonuses received in the first and second quarters of 1999 totaled over $100 million. *Mineral Revenue Collections, January-June 1999, supra* n.19.

[21] *Mineral Revenue Collections, January-June 1999, supra* n.19.

tracts would knowingly agree to pay the huge, up-front considerations . . . for such tenuous and unilaterally interruptable drilling rights." App. 63a.

MMS lease records lend perspective to that court's observation. As of the end of 1998, only about 20% of existing OCS leases were in the "production" stage, meaning that wells had been drilled on those leases that are producing oil or natural gas.[22] Thus, the vast majority of existing leases issued under the OCSLA are in, or are still (or again) undergoing, the "exploration" stage of lease activity.[23] Considering that virtually all of these active leases are located offshore of states with approved coastal zone management programs, each and every one of these OCS lessees which pursues exploration will undergo the CZMA consistency certification process as part of its OCS drilling plans.[24] Therefore, the Federal Circuit's decision in this case, which has shattered protections afforded to lessees that must use that process, has potential impacts on countless present, and future, lease planning efforts.

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[22] *MMS Offshore Stats, supra* n.16.

[23] Between 1987 and 1998, nearly 4200 exploratory wells were drilled on the over 38 million acres under lease on the OCS. *Mineral Revenues 1997: Report on Receipts from Federal and Indian Leases*, U.S. Department of Interior, Minerals Management Service (November 1998); *MMS Offshore Stats, 3d & 4th Quarter 1998, supra* n.16. Some OCS leases that are not currently "producing" could contain now-depleted wells, thus rendering those leases also subject to a return to the exploration stage of activity.

[24] *See* 43 U.S.C. § 1340(c)(2) (applying CZMA consistency certification requirements to exploration plans.)

API is also concerned that the Federal Circuit's implicit endorsement of North Carolina's objection to the POE consistency certification due to the "inadequacy of information" will only embolden other coastal states that philosophically oppose *all* offshore development to misuse the CZMA and OCSLA processes. In addition, the panel majority's decision can only encourage other Congressional interference with OCS mineral exploration and development activity for overtly political reasons. Under the lower court's ultimate ruling, if such future Congressional action is accompanied by contemporaneous state CZMA objections, the government may evidently breach its leases with impunity. Accordingly, the industry's incentive to bid for OCS leases, especially in new, frontier OCS areas, will be drastically undercut.

CONCLUSION

For the reasons stated above, the Court should grant the petitions.

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